No. 681

Supreme Court of the United States

OCTOBER TERM, 1921

CHARLES PONZI, PETITIONER, Appellant

v.

FRANKLIN G. FESSENDEN et al., DEFENDANTS, Appellees

Appeal from the District Court of the United States for the District of Massachusetts

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Before BINGHAM, JOHNSON *and* ANDERSON, *J. J.*

QUESTION OF LAW CERTIFIED BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT TO THE SUPREME COURT OF THE UNITED STATES.

BRIEF FOR THE APPELLEE FRANKLIN G. FESSENDEN

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TABLE OF CONTENTS.

TABLE OF CASES CITED.

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STATEMENT OF FACTS.

The facts in this case are as follows:

September 11, 1920, twenty-two indictments were returned against Charles Ponzi in the Superior Court

for Suffolk County in the Commonwealth of Massachusetts, charging him with certain larcenies, with being an accessory before the fact to certain larcenies, and with conspiracy to commit larceny.

October 1, 1920, two indictments charging violation of section 215 of the Penal Code were returned against said Ponzi in the District Court of the United States for the District of Massachusetts November 30, 1920, he was arraigned and pleaded guilty to the first count of one of these indictments and was sentenced by said court to imprisonment for five years in the House of Correction at Plymouth in the County of Plymouth and the Commonwealth of Massachusetts.

April 21, 1921, the Superior Court for Suffolk County issued a writ of habeas corpus directing the master of the House of Correction, who, as Federal agent, had custody of Ponzi by virtue of the mittimus issued by the United States District Court, to bring said Ponzi forthwith before said court and from day to day thereafter for trial upon the twenty-two indictments pending before it but to hold Ponzi at all times in his custody as an officer of the United States subject to the sentence imposed by the United States District Court. Blake, the master of the House of Correction, made a return to said writ to the effect that he held Ponzi pursuant to process of the United States and prayed that the writ be dismissed.

After service of this writ upon Blake, the Assistant Attorney General of the United States, by direction of the United States Attorney General, stated in open court that the United States had no objection to the issuance of the writ, to the compliance with the writ by Blake, or to the production of Ponzi for trial in the

Superior Court, and that the Attorney General directed Blake to comply with the writ.

Upon Blake's refusal to produce Ponzi the Superior Court adjudged him in contempt and committed him to the custody of a sheriff. Blake thereupon filed in the United States District Court a petition for a writ of habeas corpus directed against the sheriff, which was dismissed April 27, 1921. From this order of dismissal no appeal was taken by Blake. Thereafter Blake produced Ponzi in the Superior Court pursuant to the writ of habeas corpus issued by said court.

May 23, 1921, Ponzi filed in the said District Court a petition for a writ of habeas corpus directed against the justice of the Superior Court who issued the writ in the State proceedings, and against Blake, the master of the House of Correction, alleging, in substance, that he was within the exclusive jurisdiction of the United States, and that the State court had no jurisdiction on habeas corpus proceedings directed against said Blake, holding him as a Federal agent, to try him for said alleged crimes. If material, it further appears in the record that Ponzi, having been produced under said State process before the State court, was arraigned and stood mute, and a plea of not guilty having been entered at the direction of the court, thereupon requested to be admitted to bail, the offense for which he was indicted being bailable; and that said request was denied. Ponzi's petition for a writ of habeas corpus was denied by said District Court on May 24, 1921; and an appeal was taken to this court (the Circuit Court of Appeals). That court has certified the following question:

May a prisoner, with the consent of the Attorney General, while serving a sentence imposed by a District Court of the

United States, be lawfully taken on a writ of habeas corpus, directed to the master of the House of Correction, who, as Federal agent under a mittimus issued out of said District Court, has custody of such prisoner, into a State court, in the custody of said master and there put to trial upon indictments there pending against him?

ARGUMENT.

A. *The Petitioner must Establish Clearly either that the Law creating the Offense is Unconstitutional or that the State Court lacks Jurisdiction.*

A petition for a writ of *habeas corpus* will not be granted by a Federal court to restrain trial by a state court of a person charged with crime, unless the petitioner demonstrates with the utmost clearness either that the law creating the offense is in conflict with the Constitution of the United States or that the state court lacks jurisdiction.

Frank *v.* Mangum, 237 U. S. 309, 325, 327.
Ex parte Royall, 117 U. S. 241, 250.

B. *The Laws creating the Offenses with which Ponzi is charged are not Unconstitutional.*

We may lay upon one side any contention that the petition is being prosecuted under an unconstitutional law. The indictment for conspiracy rests upon the common law as continued in force by Mass. Const., c. VI, art. VI.

Commonwealth *v.* Ward, 1 Mass. 473.
Commonwealth *v.* Judd, 2 Mass. 329.
Commonwealth *v.* Hunt, 4 Met. 111, 121, per Shaw, C.J.

The indictments for larceny rest upon R. L., c. 208, § 26, which has been upheld against constitutional attack.

Commonwealth *v.* McDonald, 187 Mass. 581, 585.
Commonwealth *v.* Farmer, 218 Mass. 507, 509.

The indictments charging Ponzi with being accessory before the fact rest upon R. L., c. 215, §§ 2 and 3, which have been upon the statute books since 1830 and have frequently been enforced without question.

Commonwealth *v.* Smith, 11 Allen, 243.
Commonwealth *v.* White, 123 Mass. 430, 434.
Commonwealth *v.* Asherowski, 196 Mass. 342.
Commonwealth *v.* Derry, 221 Mass. 45, 47.

The jurisdiction of Massachusetts to punish these crimes is neither limited nor impaired because Ponzi may, in connection with these or other offenses, have committed an additional offense against the United States by using its mails in connection with a scheme to defraud.

Fox *v.* Ohio, 5 How. 410.
United States *v.* Marigold, 9 How. 560, 569.
Moore *v.* Illinois, 14 How. 13, 19.
Ex parte Siebold, 100 U. S. 371, 390.
Cross *v.* North Carolina, 132 U. S. 131.
Crossley *v.* California, 168 U. S. 640, 641.
Gilbert *v.* Minnesota, 254 U. S. 325, 330.
Commonwealth *v.* Walker, 108 Mass. 309.
Commonwealth *v.* Barry, 116 Mass. 1.

Even a conviction for the Federal offense is no bar to prosecution for the State offense.

Moore *v.* Illinois, 14 How. 13, 19–20.
Cross *v.* North Carolina, 132 U. S. 131, 139.

There is no defect in the laws under which Ponzi is to be tried.

C. *To try One already Serving a Sentence for Crime involves no Want of Due Process.*

Imprisonment for crime confers no immunity from trial for other offenses. The trial is conducted in the same manner whether the accused is out on bail, is held under arrest or is produced upon proper process by the warden of a prison or master of a house of correction. Due process is not affected by the mode in which the accused is brought before the court.

Ker *v.* Illinois, 119 U. S. 436.
Mahon *v.* Justice, 127 U. S. 700.
Pettibone *v.* Nichols, 203 U. S. 192.
Ex parte Lamar, 274 Fed. 160.

It is true that, if the accused is serving a sentence, he cannot be admitted to bail even though the offense for which he is now tried would otherwise be bailable. But this disability flows from his previous conviction and is in no sense connected with or incident to his present trial. A prison is not an asylum which protects the accused from trial for crimes other than that for which he is presently serving sentence.

Ex parte Lamar, 274 Fed. 160.
In re Blake, D. C. Mass., April 27, 1921, Appendix A.

Rigor *v.* State, 101 Md. 465.
State *v.* Wilson, 38 Conn. 126.
Thomas *v.* People, 67 N. Y. 218 (Ct. of Appeals, Sickels, 22).
Peri *v.* People, 65 Ill. 17.
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People *v.* Flynn, 7 Utah, 378.
Huffaker *v.* Commonwealth, 124 Ky. 115.
Clifford *v.* Dryden, 31 Wash. 545.
Ex parte Ryan, 10 Nev. 261.
Coleman *v.* State, 35 Tex. Cr. App. 404.
Brown *v.* State, 50 Tex. Cr. App. 114.
Simpson *v.* State, 56 Ark. 8.
State *v.* Keefe, 17 Wyo. 227, 252.
13 C.J. 1919, §§ 13, 14.
9 Cyc. 875, 876.
7 Am. & Eng. Encyc., 2d ed. 497.

As was said by Morton, J., in dismissing Sheriff Blake's petition for a writ of habeas corpus (*In re* Blake, D. C. Mass., April 27, 1921):

"So far as Ponzi himself is concerned none of his constitutional rights are being violated by the proceedings against him in the State court. He has no right to make his Federal sentence an asylum from prosecution there."

In *Ex parte* Lamar, 274 Fed. 160, the court said, at p. 171:

"There is no logical reason why a criminal, deprived of his liberty, should not be placed on trial a second time. His op-

portunity of offering defense to the second charge while serving a term for the first offense is as good as if he were committed without bail to imprisonment. The fact that he is serving his term on a conviction is no greater handicap to his defense than the opportunity which is offered in many, if not all, jurisdictions of proving his former conviction. He may have counsel and opportunity to secure his witnesses to offer proof as to his defense, although perhaps handicapped by his incarceration. To hold otherwise would invoke a rule of law which would frustrate the administration of justice, as, for example, where a prisoner while in jail, commits a homicide or breaks jail. If, upon apprehension in either case, he may not be tried for the offense thus committed until he has served possibly a long term for the first offense, witnesses may die and the administration of justice would be defeated. I think that the court could try the petitioner and that it had jurisdiction so to do."

So also in Rigor *v.* State, 101 Md. 465, 471, the court in holding that a prisoner confined in the penitentiary could be produced upon a writ of *habeas corpus ad prosequendum* for trial upon another charge, said:

"It is contended that a writ of *habeas corpus* cannot be used to bring a convict from the penitentiary into the Criminal Court for trial upon an indictment there pending against him, while he is serving a sentence of imprisonment under a conviction of felony entered against him in another Court of the State; and the error complained of is that the Criminal Court refused to quash the writ of *habeas corpus*. Assuming, for the moment, that this Court has authority to review the ruling thus made, there can be no doubt as to the correctness of the Court's action. A writ of *habeas corpus* will bring a convict from the penitentiary into Court, not for the purpose of having the cause of his detention inquired into, but either because he may be needed as a witness, or *because a pending indictment*

against him ought to be heard and determined. The penitentiary is not a place of sanctuary; and an incarcerated convict ought not to enjoy an immunity from trial merely because he is undergoing punishment on some earlier judgment of guilt. Why should there be a delay in bringing to trial, on an indictment pending against him, a convict who has not yet completed the service of a previous sentence: No reason can be suggested for such a delay in the case of a convict adjudged guilty of some other offense and actually in execution of a sentence thereunder, that does not apply equally to an individual who has been indicted but has not yet been tried. The situation of the two is identical except for the single circumstance that in the first instance the criminal who has more frequently violated the law has been tried and convicted for some of his offenses, whilst the other has not. It is not the policy of the law to encourage the commission of crime. Delay in administering the criminal law and in inflicting punishment promotes crimes as observation and common experience abundantly demonstrate. And if the Courts should hold that one already convicted and actually incarcerated under sentence, could not be brought before the Court on a writ of *habeas corpus* and tried for some other offense, until the expiration of the first sentence, a temptation to commit a crime for the express purpose of escaping altogether or at least of deferring punishment for a previous one, would be held out to the evil minded and depraved. Suppose, for instance, that a homicide had been committed and the assassin has escaped and that for the time being a suspicion does not point to him but is directed towards another. Suppose that the real criminal returns to the scene of the murder and in the vicinity commits a larceny and is arrested therefor and pleads guilty and is sentenced to confinement for eight or ten years in the penitentiary; and that after beginning to serve out that sentence, evidence is discovered which indicates that he was the murderer. Suppose further he should, when confronted with the evidence inculpating him, confess his guilt, and that he should then be indicted for the crime of murder. Would any Court hesitate

to issue a writ of *habeas corpus* directed to the warden of the penitentiary requiring him to produce the convict so that the latter might be put upon trial for the capital offense? Can it be possible that the Court would be so hopelessly impotent, in such circumstances, as to be unable to do anything until the expiration of the sentence of eight or ten years; by which time the main witnesses might be dead, and the ends of justice might be defeated? And yet, if the contention made in the case at bar is sound, the arm of the criminal law would be paralyzed — not a step could be taken towards prosecuting him so long as the convict remained sheltered within the walls of the penitentiary. That is not the law. The Criminal Court had jurisdiction to bring the plaintiff in error before it under a writ of *habeas corpus* and to place him on trial under the indictment there pending against him. *Re* Wetton, 1 Cromp. & Jarvis, 459. In Regina *v.* Day, 3 F. & F. 526, it was held that the Court will not grant an application for a *habeas corpus* to remove a prisoner from gaol, where he is undergoing sentence, in order to take him before a magistrate in another county, to prefer another charge against him; but will grant a *habeas corpus* to bring him up for trial on a true bill being found against him at the assizes on that charge. State *v.* Wilson, 38 Conn. 126; People *v.* Flynn, 7 Utah, 378; *Ex parte* Ah Men, 77 Cal. 202; 15 Am. & Eng. Ency. L. (2 ed.) 191."

D. *Ponzi was brought before the Superior Court of Suffolk County upon Proper and Appropriate Process.*

R. L., c. 191, § 25, now G. L., c. 248, § 25, provides as follows:

"This chapter shall not affect the power of the supreme judicial court, or of a justice thereof, to issue a writ of habeas corpus at discretion, and thereupon to bail a person for whatever cause he has been committed or restrained or to discharge him as law and justice require, unless he has been committed

by the governor and council, the senate or the house of representatives, in the manner and for the causes mentioned in the constitution; nor affect the power of any court or magistrate to issue a writ of habeas corpus, when necessary to bring before it or him a prisoner for trial in a criminal case pending before it or him; or to bring in a prisoner to be examined as a witness in a suit or proceeding, civil or criminal, pending before it or him, if the personal attendance and examination of the witness is necessary for the attainment of justice."

The writ directing Sheriff Blake to produce Ponzi for trial before the Superior Court was issued under this section. This writ is the process appropriate to secure the presence of a prisoner *for trial*. It is obvious that a warrant cannot issue for the apprehension of a prisoner already confined in prison. The prisoner is in the custody of his jailer pursuant to the mittimus. He should be left in that custody to the end that his sentence may not be in any manner interrupted. Yet it is essential that he be produced in court in order that trial may be had according to law. Hence the writ issues to the jailer or custodian, directing him to produce the prisoner, not for inquiry into the legality of the detention, but simply to secure the presence of the accused in the court room while the trial proceeds. Such a writ is simply the proper process designed to secure the presence of one who is already serving a sentence.

Ex parte Bollman, 4 Cranch 75, 97.
Ex parte Lamar, 274 Fed. 160, 164, 169.
In re Blake, Appendix A.
Rigor *v.* State, 101 Md. 465.
Way *v.* Wright, 5 Met. (Mass.) 380.

The fact that Ponzi is in the custody of Blake as a Federal agent does not deprive the state court of power to *issue* this writ. A state court may *issue* the great constitutional writ of *habeas corpus ad subjiciendum* even though the prisoner be confined under Federal process. When the Federal officer makes return that he holds the prisoner under the authority of the United States, he establishes a good defense, and the state court can neither proceed to inquire into the legality of such detention nor relieve the prisoner therefrom.

Ableman *v.* Booth, 21 How. 506, 523.

If the state court has jurisdiction to issue the great constitutional writ designed to test the legality of the confinement, it is plain that it has jurisdiction to issue the procedural writ designed to bring a prisoner before it for trial. The only question which arises in such a case is whether any sufficient defense to the execution of the writ is disclosed *by the officer who holds the prisoner in custody*. That question has already been determined in the habeas corpus proceeding brought by Sheriff Blake.

In re Blake, Appendix.

E. *Ponzi cannot be Heard to Assert that the Present Writ is an Invasion of the Rights of the United States.*

Ponzi attempts to assert that to try him while he is still serving a sentence as the prisoner of the United States is an invasion of Federal sovereignty. That contention is not open to him. He is not the government of the United States. Even if the United States

could successfully oppose this writ, Ponzi has no authority to decide that question for the United States. The question is one of comity between the United States and the Commonwealth of Massachusetts. The decision whether to oppose the writ or to permit it to be executed is to be determined by the United States alone in the light of all the circumstances of the particular case. Ponzi can neither speak for the United States nor demand as of right an asylum in Plymouth jail.

In Ker *v.* Illinois, 119 U. S. 436, in holding that the right of Peru to refuse to surrender a fugitive from justice did not vest in the fugitive a right to demand asylum therein if Peru saw fit to surrender him, this court said, at p. 442:

"Nor can it be doubted that the government of Peru could of its own accord, without any demand from the United States, have surrendered Ker to an agent of the State of Illinois, and that such surrender would have been valid within the dominions of Peru. It is idle, therefore, to claim that, either by express terms or by implication, there is given to a fugitive from justice in one of these countries any right to remain and reside in the other; and if the right of asylum means anything, it must mean this. The right of the government of Peru voluntarily to give a party in Ker's condition an asylum in that country, is quite a different thing from the right in him to demand and insist upon security in such an asylum."

In *In re* Andrews, 236 Fed. 300, the court, in holding that the United States might surrender to a state one held for deportation, without his consent, said, at p. 301:

"It is well settled that a state would have no right to take the relator out of the custody of the officers of the United States in these circumstances without the approval of the

United States. Ableman *v.* Booth, 21 How. 506, 16 L. Ed. 169; Tarble's Case, 13 Wall. 397, 20 L. Ed. 597. And it is equally well settled as a matter of comity between the federal and the state governments that either may surrender its custody of a prisoner to the other without the prisoner's consent. In such a case, the question of the jurisdiction and custody of the prisoner is one of comity between the governments, and not a personal right of the prisoner. United States *v.* Marrin (D. C.), 227 Fed. 314; *Ex parte* Marrin (D. C.), 164 Fed. 631."

In *Ex parte* Marrin, 164 Fed. 631, the District Court of New York declined to issue a writ of *habeas corpus* to release a prisoner in the custody of the state, charged with crime, because such prisoner was arrested while at large upon bail, awaiting the determination of a charge of crime pending before the Federal courts for the third Circuit, where neither the United States nor his principal upon the bail bond intervened to request such release. In holding that the prisoner could not assert on his own behalf any right of the United States, the court said, at page 637:

"If the presence of the defendant in Philadelphia were demanded by the United States, and if the ends of justice seemed so to require, it is believed that this court, in the exercise of its discretion, could enforce the jurisdiction of the United States District Court for the Eastern District of Pennsylvania, and compel the return of the defendant for such further proceedings as might there be proper; but under the existing conditions of the case the exercise of this discretion is unnecessary, and the defendant or petitioner is not entitled to ask as a right what does not seem to be proper as a matter even of discretion.

Frank C. Marrin, therefore, does not seem to be held contrary to any law of the United States, nor in violation of any

of his constitutional rights, and the writ of habeas corpus must be dismissed, and the defendant returned to the warden of the city prison, in the Burrough of Brooklyn, to be held under the commitment of the County Court of King's county."

The above case was approved in United States *v.* Marrin, 227 Fed. 314, 318 (C. C. A. 3d).

Logan *v.* United States, 144 U. S. 263, does not aid Ponzi. All that that case decided was that a prisoner of the United States is entitled to protection from mob violence. A right to be protected from murder without trial is not a right not to be produced for trial before a duly constituted court having jurisdiction of the offense.

In the light of these authorities it is plain that Ponzi cannot be heard to assert in the name of the United States that to produce him for trial in the State court is any invasion of the right of the United States to hold him a prisoner during the term of his sentence. He is attempting to invoke a right which pertains not to him, but to the United States.

F. *No Right of the United States is in Fact infringed by the Production of Ponzi for Trial in a State Court.*

The relation between the states and the United States is not that of one foreign government to another. The United States of America is a single undivided nation. The governmental powers of that nation have been apportioned by the Federal Constitution between the states on the one hand and the Federal government upon the other. Neither the states nor the United States may usurp powers committed or

reserved to the other, or impede the other in the execution of those powers.

> McCulloch *v.* Maryland, 4 Wheat. 316.
> Dobbins *v.* Commissioners of Erie County, 16 Pet. 435.
> The Collector *v.* Day, 11 Wall. 113.
> Hammer *v.* Dagenhart, 247 U. S. 251.

But the relation between the two is one of comity and co-operation.

> Fort Leavenworth R.R. Co. *v.* Lowe, 114 U. S. 525, 541.
> Frank *v.* Mangum, 237 U. S. 309, 328.

The salutary doctrine of the separation of powers is not to be pressed to a dryly logical conclusion which would impede each in the exercise of the powers committed or reserved to it.

Execution of the writ directing Sheriff Blake to produce Ponzi for trial involves no invasion of the territorial sovereignty of the United States. The Plymouth House of Correction is a state institution situated within the Commonwealth. It has never been ceded to or purchased by the United States. Ponzi is confined therein by consent of the Commonwealth.

> G. L., c. 126, §§ 4, 8, formerly R. L., c. 224, §§ 4, 8.

There can be no question that a writ issued under G. L., c. 248, § 25, runs within the Plymouth House of Correction. Any contention that Ponzi is in a different

territorial jurisdiction is wholly without foundation. The objection, unsuccessfully raised by Lamar, to the transfer from Georgia to New York, has no support in the facts of this case.

See *Ex parte* Lamar, 274 Fed. 160.

The objection that production of Ponzi *for trial* is an interference with the execution of his federal sentence is untrue in fact. Production of a prisoner for trial in the custody of his jailer does not modify his sentence. A federal prisoner may be produced for trial before the federal court of another district. In *Ex parte* Lamar, 274 Fed. 160, 164, the court says:

"A writ of habeas corpus may be issued 'when it is necessary to remove a prisoner in order to prosecute or bear testimony, in any court, or to be tried in the proper jurisdiction wherein the act was committed.' *Ex parte* Bollman, 8 U. S. (4 Cranch) 75, 2 L. Ed. 554. And a writ of habeas corpus ad prosequendum requiring the production of a prisoner for trial is a power granted by section 262 of the Judicial Code (Comp. St. § 1239). Section 1014 of the Revised Statutes (Comp. St. § 1674) provides how offenders against the United States may be arrested and removed for trial. It provides:

'And where an offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had.'"

A state prisoner may be produced for trial before a state court.

In re Blake, D. C. Mass., April 27, 1921, Appendix A.

Rigor *v.* State, 101 Md. 465.
State *v.* Wilson, 38 Conn. 126.
Thomas *v.* People, 67 N. Y. 218 (Ct. of Appeals, Sickels, 22).
Peri *v.* People, 65 Ill. 17.
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State *v.* Keefe, 17 Wyo. 227, 252.
13 C.J. 1919, §§ 13, 14.
9 Cyc. 875, 876.
7 Am. & Eng. Encyc., 2d Ed. 497.

In *In re* Thaw, 166 Fed. 71, it was held that a state prisoner might be produced to testify before a federal court. And in *In re* Blake (Appendix), the District Court of Massachusetts held that Ponzi could be produced for trial before the Superior Court of Suffolk County. Temporary production in order that the prisoner may be tried or give testimony does not in any just sense conflict with the mittimus under which he is held.

In re Blake, Appendix.
State *v.* Wilson, 38 Conn. 126.
Way *v.* Wright, 5 Met. 380.

Storti's Case, 178 Mass. 549, 554.
Rigor *v.* State, 101 Md. 465.
R. S., § 753; U. S. Comp. Sts., 1916, § 1281.

In contemplation of law he is still serving his sentence in the penal institution to which he is committed.

We frankly concede that the state court cannot release a federal prisoner from federal custody upon a writ of *habeas corpus ad subjiciendum*.

Ableman *v.* Booth, 21 How. 506.
Tarble's Case, 13 Wall. 397.

It is a sufficient answer to this writ that the officer holds the prisoner under the authority of the United States. But the writ upon which Ponzi is produced before the Superior Court of Suffolk County is not of this character. It does not draw in question the legality of his detention. It expressly recognizes the superior right of the United States to hold Ponzi in confinement. (R., p. 2.) The distinction between the procedural writ which directs the production of a prisoner for trial or to give testimony, and the constitutional writ designed to test the legality of his detention in custody is clearly settled.

Ex parte Bollman, 4 Cranch 75, 97.
Ex parte Dorr, 3 How. 103, 104.
In re Thaw, 166 Fed. 71.
In re Blake, Appendix.
Ex parte Lamar, 274 Fed. 160, 164, 169.
Rigor *v.* State, 101 Md. 465.
Wilson *v.* State, 38 Conn. 126, 135.
3 Bl. Com. *129.

Nor does sentence present any difficulty; the court has power to sentence "from and after" the expiration of the federal sentence.

Kite *v.* Commonwealth, 11 Met. 581.
Ex parte Lamar, 174 Fed. 160.

The principle of Ableman *v.* Booth does not apply.

Public policy demands that neither the division of this country into states nor the apportionment of powers between the states and the United States shall afford an asylum to those charged with crime. The Constitution itself requires each state to surrender fugitives from justice to the state from which they fled.

U. S. Cons., art. IV, § 2.

Places ceded by a state to the United States are not permitted to be havens from state process.

Fort Leavenworth R.R. Co. *v.* Lowe, 114 U. S. 525.
Commonwealth *v.* Clary, 8 Mass. 72.
39 Cyc. 730.

Indeed, the United States, with the consent of a state, may commit federal prisoners to state penal institutions.

Randolph *v.* Donaldson, 9 Cranch 76.
Ex parte Wilson, 114 U. S. 417.
G. L., c. 126, §§ 4, 8; R. L., c. 224, §§ 4, 8.

Ponzi was so committed in the instant case. It would be a clear departure from the policy so established to hold that a federal prisoner committed to a state in-

stitution cannot be produced before the state court for trial in the custody of his jailer in the same manner as a state prisoner, even though the United States does not object to production for this temporary purpose.

No contrary inference can be drawn from R. S., § 753; U. S. Comp. Sts., 1916, § 1281, which provides, in part:

> "The writ of habeas corpus shall in no case extend to a prisoner in jail . . . unless it is necessary to bring the prisoner into court to testify."

That section is derived from the Judiciary Act of 1789 (1 Stat. 81, § 14). Congress may not have deemed it expedient at that time to require that a state prisoner should be produced in a federal court for trial, irrespective of consent or objection by the state and without any consideration whether such production would, under the circumstances of the particular case, interfere with trial by the state. It may well be that broader powers are now possessed under R. S., § 1214 (U. S. Comp. Sts., 1916, § 1674, and Jud. Code § 262; U. S. Comp. Sts., 1916, § 1239).

See *Ex parte* Lamar, 274 Fed. 160, 164.

But even if it be assumed that Congress has not conferred power on the Federal courts to order the production of a state prisoner for trial, that furnishes no reason why the broader state provision should be denied effect when in fact the production of the Federal prisoner in no way interferes with any right of the United States. Indeed, the provision for production in order to testify is a recognition that production for

a purpose which does not draw in question the legality of the confinement is not an invasion of the right to hold the prisoner in such confinement.

In re Thaw, 166 Fed. 71.
In re Blake, Appendix.

G. *The Superior Court of Suffolk County has Jurisdiction to try Ponzi when Produced in the Custody of Blake.*

The Superior Court of Suffolk County has jurisdiction of the subject matter, namely, the offenses with which Ponzi stands charged.

See B, *supra.*

Ponzi is before the court upon valid process issued by that court.

See E, *supra.*

He is *not* before the court upon order of the Attorney General of the United States. The United States has appeared by the Attorney General, who represents it in all litigation, and stated in open court that it has no objection to the issue of the writ or to compliance by Blake therewith. (R., p. 2.) Such assent is sufficient.

In re Blake, Appendix.

The question whether production upon order of the Attorney General without other process would confer jurisdiction does not arise, and the objection raised without avail by Lamar finds no support in the facts.

See *Ex parte* Lamar, 274 Fed. 160.

Even if Ponzi had been kidnapped and brought by force into Massachusetts, or had been illegally transferred from another state or country, so that the present process might be served upon his keeper, the Superior Court would not lack jurisdiction and Ponzi could not by a writ of habeas corpus successfully oppose trial.

Ker *v.* Illinois, 119 U. S. 436.
Mahon *v.* Justice, 127 U. S. 700.
In re Johnson, 167 U. S. 120.
Pettibone *v.* Nichols, 203 U. S. 192.
Ex parte Lamar, 274 Fed. 160.

The objection that Ponzi is not in the custody of the Superior Court is wholly without merit. Custody is not an ingredient of due process of law. Even the Fifth and Sixth Amendments to the Federal Constitution, which are not a limitation upon the states and which impose upon the United States a stricter rule than "due process" requires (see Twining *v.* New Jersey, 211 U. S. 78; Maxwell *v.* Dow, 176 U. S. 581; Hurtado *v.* California, 110 U. S. 516), do not enumerate the right to be held in custody among the requirements of trial according to law. Nor is custody enumerated in the definition of "due process" given in Frank *v.* Mangum, 237 U. S. 309, 326:

"As to the 'due process of law' that is required by the Fourteenth Amendment, it is perfectly well settled that a criminal prosecution in the courts of a State, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the State, so long as it includes notice, and a hearing, or an opportunity to be heard,

before a court of competent jurisdiction, according to established modes of procedure, is 'due process' in the constitutional sense. Walker *v.* Sauvinet, 92 U. S. 90, 93; Hurtado *v.* California, 110 U. S. 516, 535; Andrews *v.* Swartz, 156 U. S. 272, 276; Bergemann *v.* Backer, 157 U. S. 655, 659; Rogers *v.* Peck, 199 U. S. 425, 434; Drury *v.* Lewis, 200 U. S. 1, 7; Felts *v.* Murphy, 201 U. S. 123, 129; Howard *v.* Kentucky, 200 U. S. 164.'"

We may assume that one charged with a felony has a right to be personally present during those portions of the trial where an opportunity to be heard should be accorded.

Hopt *v.* Utah, 110 U. S. 574, 577.
Lewis *v.* United States, 146 U. S. 370.
G. L., c. 278, § 6; R. L., c. 219, § 6.

But even presence is not required at every stage of the proceedings.

Schwab *v.* Berggren, 143 U. S. 442, 446.
Commonwealth *v.* Cody, 165 Mass. 133, 138.
Commonwealth *v.* Costello, 121 Mass. 371.

And the right to be present at every moment of the trial may be waived.

Frank *v.* Mangum, 237 U. S. 309, 338.
Valdez *v.* United States, 244 U. S. 432, 445.
Dowdell *v.* United States, 221 U. S. 325.
Howard *v.* Kentucky, 200 U. S. 164, 172.

Custody is simply one means by which the presence of the accused is secured. One out on bail is not in any

sense in the custody of the court. He is at large in the custody of the bail.

Commonwealth *v.* Brickett, 8 Pick. 138.

In Graves' Case, 236 Mass. 493, 497, the court said:

"He (petitioner) was not in the custody of the court but at large in the custody of the bail."

Indeed, one out on bail is so nearly at liberty that *habeas corpus* will not lie to release him from a restraint so nominal.

Sibray *v.* United States, 185 Fed. 401.
In re O'Brien, 29 Mont. 530.
Ex parte Walker, 53 Miss. 366.
Ex parte Henion, 55 Pac. 326 (Cal.).

See also Wales *v.* Whitney, 114 U. S. 564, 571.

Yet one out on bail may be tried if personally present although in no sense in the custody of the court.

Diaz *v.* United States, 223 U. S. 442, 453.
Commonwealth *v.* McCarthy, 163 Mass. 458.

The means by which presence is secured are not to be confused with the right to be present. If the accused be present, it is immaterial by what means such presence is obtained.

Ker *v.* Illinois, 119 U. S. 436.
Mahon *v.* Justice, 127 U. S. 700.
Pettibone *v.* Nichols, 203 U. S. 192.
Ex parte Lamar, 274 Fed. 160.

Indeed, no prisoner is in any just sense in the custody of the court. He is in the custody of an executive

officer whether he is simply under arrest or actually serving sentence. A penal institution is no part of the court nor are the officers thereof officers of the court. A prisoner serving sentence is produced in the custody of the warden or master or of his deputy. If custody *by the court* were an ingredient of jurisdiction, no prisoner serving sentence could be tried, which is manifestly not the case.

See C, *supra*.

The court obtains jurisdiction of the person of the prisoner when the officer produces him in obedience to process.

Ex parte Lamar, 274 Fed. 160.
In re Blake, Appendix.

That condition is fulfilled in the case of Ponzi.

The objection that the court lacks jurisdiction because Ponzi is produced in the custody of a federal agent is without substance. As Blake produces Ponzi for trial in obedience to the same process upon which Blake would produce a state prisoner for trial, the situation of Ponzi differs in no essential respect from that of any prisoner produced for trial in the custody of his jailer. So long as Blake obeys the process (as in the present case he must) and the United States does not object, Ponzi cannot make either a constitutional or jurisdictional point out of the color of his jailer's uniform. He is present in court in obedience to process and that suffices.

Mahon *v.* Justice, 127 U. S. 700.
Pettibone *v.* Nichols, 203 U. S. 192.

II. *The District Court, in the Exercise of a Sound Discretion, Properly Dismissed the Writ brought by Ponzi.*

The petition was rightly dismissed upon another ground as well. The question whether trial of Ponzi under the circumstances here disclosed constitutes due process cannot properly be determined until trial has been had and Ponzi has exhausted his remedy in the state courts and upon writ of error (if that will lie) to the Supreme Court of the United States. A question of jurisdiction, which can properly be reviewed upon appellate proceedings, should not be determined in advance upon *habeas corpus* unless the petitioner shows beyond all doubt that the jurisdiction to try does not exist.

In Frank *v.* Mangum, 237 U. S. 309, the court said, at p. 328:

"And the question whether a State is depriving a prisoner of his liberty without due process of law, where the offense for which he is prosecuted is based upon a law that does no violence to the Federal Constitution, cannot ordinarily be determined, with fairness to the State, until the conclusion of the course of justice in its courts. Virginia *v.* Rives, 100 U. S. 313, 318; Civil Rights Cases, 109 U. S. 3, 11; McKane *v.* Durston, 153 U. S. 684, 687; Dreyer *v.* Illinois, 187 U. S. 71, 83-84; Reetz *v.* Michigan, 188 U. S. 505, 507; Carfer *v.* Caldwell, 200 U. S. 293, 297; Waters-Pierce Oil Co. *v.* Texas (No. 1), 212 U. S. 86, 107; *In re* Frederich, Petitioner, 149 U. S. 70, 75; Whitten *v.* Tomlinson, 160 U. S. 231, 242; Baker *v.* Grice, 169 U. S. 284, 291; Minnesota *v.* Brundage, 180 U. S. 499, 503; Urquhart *v.* Brown, 205 U. S. 179, 182.

It is, indeed, settled by repeated decisions of this court that where it is made to appear to a court of the United States

that an applicant for *habeas corpus* is in the custody of a state officer in the ordinary course of a criminal prosecution, under a law of the State not in itself repugnant to the Federal Constitution, the writ, in the absence of very special circumstances, ought not to be issued until the state prosecution has reached its conclusion, and not even then until the Federal questions arising upon the record have been brought before this court upon writ of error. *Ex parte* Royall, 117 U. S. 241, 251; *In re* Frederich, Petitioner, 149 U. S. 70, 77; Whitten *v.* Tomlinson, 160 U. S. 231, 242; Baker *v.* Grice, 169 U. S. 284, 291; Tinsley *v.* Anderson, 171 U. S. 101, 105; Markuso *v.* Boucher, 173 U. S. 184; Urquhart *v.* Brown, 205 U. S. 179. And see Henry *v.* Henkel, 235 U. S. 219, 228. Such cases as *In re* Loney, 134 U. S. 372, 376, and *In re* Neagle, 135 U. S. 1, are recognized as exceptional.

It follows as a logical consequence that where, as here, a criminal prosecution has proceeded through all the courts of the State, including the appellate as well as the trial court, the result of the appellate review cannot be ignored when afterwards the prisoner applies for his release on the ground of a deprivation of Federal rights sufficient to oust the State of its jurisdiction to proceed to judgment and execution against him. This is not a mere matter of comity, as seems to be supposed. The rule stands upon a much higher plane, for it arises out of the very nature and ground of the inquiry into the proceedings of the state tribunals, and touches closely upon the relations between the state and the Federal governments. As was declared by this court in *Ex parte* Royall, 117 U. S. 241, 252 — applying in a *habeas corpus* case what was said in Covell *v.* Heyman, 111 U. S. 176, 182, a case of conflict of jurisdiction: — 'The forbearance which courts of coordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between state courts

and those of the United States it is something more. It is a principle of right and of law, and, therefore, of necessity.' And see *In re* Tyler, Petitioner, 149 U. S. 164, 186."

The rule applies with peculiar force to the case where the petitioner is already serving a sentence which in all probability will more than outlast the trial and any appellate proceedings resulting therefrom, and so can suffer no deprivation of liberty by reason of them. Even if there had been (as there is not) any real question as to the jurisdiction of the Superior Court, the court below rightly dismissed the petition in the exercise of a sound discretion.

Ex parte Royall, 117 U. S. 241.

CONCLUSION.

Public policy requires speedy trial for crime. Delay may cause a failure of justice. Witnesses may die or disappear and evidence may be lost. If the accused be innocent, he should be speedily vindicated. If he be guilty, swift and certain conviction is a salutary example which tends to deter others from committing crime. Delay aids the guilty, injures the innocent and brings the law into disrepute.

Guilt confers no special privilege. Conviction and sentence are no bar to trial for other offenses. A prisoner may be produced for trial in the custody of his jailer upon appropriate process directed to the jailer. There is no sensible distinction between one held under arrest without bail and a prisoner who is serving a sentence upon a conviction previously had. Production upon a writ of *habeas corpus ad prosequendum* is

as effectual to confer jurisdiction of the person as arrest upon a warrant or appearance under the compulsion of the bail. In either case due process is satisfied if the accused be present in court and receive trial according to law. A different rule would place the convicted criminal in a favored class simply because he has been found guilty and sentenced. Guilty persons are confined in prison for the protection of society, not in order to protect them from prosecution for other offenses.

A federal prisoner has no special constitutional privilege. The constitutional principle that the state shall not impede the United States in the execution of its constitutional powers is not a privilege or immunity of the citizen. Sentence for violation of the laws of the United States does not entitle a federal prisoner to invoke it. He has no right to determine whether his jailer shall obey a writ of *habeas corpus ad prosequendum* issued by a state court. That question is to be determined by the United States in the light of all the circumstances of the particular case. If the United States, acting through its chief law officer, who represents it in all litigation, appears in open court and waives objection to the execution of the writ, that federal question is eliminated. The prisoner being before the court upon process issued by the court cannot prevent trial by invoking the constitutional writ of *habeas corpus ad subjiciendum*.

Ker *v.* Illinois, 119 U. S. 436.
Mahon *v.* Justice, 127 U. S. 700.
In re Johnson, 167 U. S. 120.
Pettibone *v.* Nichols, 203 U. S. 192.

The salutary power to punish crime, which is possessed by both the United States and the several states, should not be impeded by a narrow view of the relations between the two. The relation is one of comity. Conflict is to be avoided. Neither a state prison nor a federal prison nor the custody of a state officer, acting as a federal agent, should be an asylum for fugitives from justice. It is manifest that production of a federal prisoner before the state court in the custody of his jailer for the temporary purpose of ascertaining his guilt or innocence of other offenses in no way interferes with the right of the United States to hold such prisoner for the term of his sentence where any state sentence which may be imposed must be limited to take effect from and after the expiration of the federal sentence. A different view would offer a direct inducement to commit crime against the United States in order to secure asylum in federal custody. It would defeat one of the chief ends of government, namely, the protection of the citizen from criminal wrong.

The question certified should be answered in the ~~negative~~ affirmative.

Respectfully submitted,

J. WESTON ALLEN,
Attorney General for the
Commonwealth of Massachusetts.

EDWIN H. ABBOT, JR.,
Assistant Attorney General.

APPENDIX A.

DISTRICT COURT OF THE UNITED STATES.

No. 1985 Civil. DISTRICT OF MASSACHUSETTS.

In re EARL P. BLAKE,

PETITIONER FOR HABEAS CORPUS.

OPINION.

(27 APRIL, 1921.)

MORTON, J. This is a petition for habeas corpus to secure the discharge of the petitioner, who stands committed for contempt by the State Court. The facts are not in dispute and are as stated in the petition and in the answer. They may be briefly summarized as follows:

Mr. Blake is the keeper of the House of Correction at Plymouth, Mass. On 30 November, 1920, one Charles Ponzi was sentenced by this Court to imprisonment there for a term of five years. The mittimus duly issued and Ponzi is now held by Mr. Blake under said sentence. Ponzi has been indicted in the State Court and the Commonwealth desires to try him at once on said indictment. It applied for and obtained from the State Court a writ of habeas corpus ad testificandum, ad prosequendum, etc., the object of which was to secure the presence of Ponzi in order that he might be tried and, if convicted, sentenced. The

writ directed the petitioner to produce Ponzi in the State Court for the purpose stated, and was so phrased as to show clearly that the validity and priority of the Federal sentence was clearly recognized, that no interference with Federal custody was intended, and that nothing inconsistent with the sentence would be attempted by the State Court. The Attorney General of the United States appeared by one of his Assistants in the State Court and assented to the issuance of the writ; he has also directed Mr. Blake to produce Ponzi in accordance with it.

Mr. Blake was advised by counsel that the State Court had no authority over a Federal prisoner, and that even with the assent of the United States Attorney General it would not be legal or proper for him to produce Ponzi in the State Court. He therefore respectfully declined to do so, following the practice laid down in Robb *v.* Connolly, 111 U. S. 624, by which, as he was advised, the proceeding was governed. The State Court adjudged him in contempt for his refusal to obey the writ and produce Ponzi as directed, and made an order committing him to custody. Thereupon the present petition was brought.

So far as Ponzi himself is concerned, none of his constitutional rights are being violated by the proceedings against him in the State Court. He has no right to make his Federal sentence an asylum from prosecution there.

Nor is he being relaxed to another jurisdiction for trial upon an administrative or executive order. The State Court, upon proceedings duly had, has issued its writ requiring Mr. Blake to produce Ponzi before it for trial, and after full hearing has held that its writ must be obeyed.

The only party having standing to question that decision is the United States, upon the ground that its exclusive jurisdiction and control over Ponzi as its prisoner is thereby interfered with. The United States, however, makes no such objection. On the contrary, as before stated, its Attorney General appeared by his Assistant in the State Court and there assented on its behalf to the issue of the writ.

The position of the petitioner therefore comes to this, that the action of the State Court constitutes such a fundamental violation of Federal jurisdiction as to be invalid, and that it is his duty to disregard it, even though done with the assent of the Attorney General.

Of the exclusive jurisdiction of the United States over Ponzi there can be — and is — no question. (Robb *v.* Connolly, *supra.*) The sentence imposed on him here must be carried out unless modified by Executive action, and cannot be interfered with in any other way. It is not essential, however, that the mittimus shall be literally obeyed. In matters which do not substantially increase the hardship of the sentence, there is considerable latitude of action. For instance, the Attorney General may, within certain limitations, transfer prisoners under sentence from one prison to another; and it is customary for the Federal authorities to honor writs of habeas corpus ad testificandum issued by State Courts desiring the testimony of Federal prisoners; and conversely for this Court to issue similar writs for prisoners under State sentence. So far as I am aware, no question has ever been raised as to the legality of such action.

Doubtless, such writs do, strictly speaking, interfere

somewhat with the execution of the sentence and infringe — technically — on the other jurisdiction. The reason for the practice probably is that it is more convenient for the Court where the testimony of the prisoner is needed to issue the writ; and no harm is done.

Writs ad testificandum are essentially different from the real — or so-called "prerogative" — writ of habeas corpus. They recognize the validity of the imprisonment, while the "prerogative" writ questions it and puts it on trial. Robb *v.* Connolly, *supra*, which is relied on by the petitioner was a "prerogative" writ, and that decision is distinguishable from the present case. Of course, the United States could not submit to have the legality of sentences imposed in its Courts tried in another jurisdiction; nor could the States, except as to questions arising under the Constitution or laws of the United States.

The writ issued by the State Court for Ponzi explicitly recognizes the Federal custody and jurisdiction of him and does not undertake to interfere with either. It does not bring in question the legality of his sentence, and will interfere with it no more than a habeas corpus ad testificandum might do. Whether against objection made on behalf of the United States the State Court could have issued it, it is not necessary to decide. When rights or interests of the United States must be considered in litigation between third parties, the Attorney General has the power within wide limits to speak for the United States. In assenting to the issue of the writ by the State Court, he acted within his powers.

I think it clear that the action of the State Court was not such an obvious, unwarranted, and fundamental interference with the jurisdiction of the United States as would justify this Court in holding that the petitioner ought to disregard it. On the contrary, it is, in my opinion, his duty to obey, provided, of course, that all expenses occasioned by the writ are paid by the State, and adequate precautions, satisfactory to Mr. Blake, are taken by it to secure and protect the prisoner, while being transported and attending under the writ.

It follows that the petition must be dismissed.

I may add that, in view of the novelty and importance of the question, I think that Mr. Blake was quite justified in submitting the matter to the Court under whose mittimus he held the prisoner, before producing him elsewhere, and in taking such steps as were necessary properly to raise the question.

ENDORSED.

No. 1985 Civil.

In re EARL P. BLAKE.

PETITIONER FOR HABEAS CORPUS.

OPINION.

United States District Court,

Mass. Dist.

Filed in Clerk's Office,

Apr. 27, 1921.

DISTRICT COURT OF THE UNITED STATES,
DISTRICT OF MASSACHUSETTS.

I, ARTHUR M. BROWN, Deputy Clerk of the District Court of the United States for the District of Massachusetts, and during the temporary absence of the Clerk, in charge of the affairs of the Clerk's office of said Court and the custodian of its files and records, do hereby certify that the foregoing is a true copy of the OPINION handed down April 27, 1921, in the cause entitled *In re* EARL P. BLAKE, Petitioner for Habeas Corpus, and numbered 1985 on the Civil Docket of said Court.

In testimony whereof, I hereunto set my hand and affix the seal of said Court, at Boston, in said District, this twenty-eighth day of April, A.D. 1921.

ARTHUR M. BROWN,
Deputy Clerk.

(Seal)